No. 78-116

In the Supreme Court of the United States

OCTOBER TERM, 1978

THE OKLAHOMA PUBLISHING CO., ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals in the two cases in which certiorari is sought (No. 76-1625, Pet. App. 30a-31a and No. 77-1531, Pet. App. 36a-37a) are not reported. The district court opinions (Pet. App. 15a-29a and 34a-35a) are not reported. An earlier related opinion of the court of appeals in No. 74-1676 (Pet. App. 11a-14a) is also unreported.

JURISDICTION

The judgment in No. 76-1625 (Pet. App. 30a-31a) was entered on January 13, 1978, and a petition for rehearing was denied on April 6, 1978 (Pet. App. 32a-33a). The judgment in No. 77-1531 (Pet. App. 36a-37a) was entered on March 16, 1978. On June 2, 1978, Mr. Justice White

extended the time for filing a petition for a writ of certiorari in both cases to and including July 21, 1978. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly directed that an inquiry into allegations of impropriety by the Equal Employment Opportunity Commission (EEOC) in the filing of a Commissioner's charge of discrimination against petitioners be deferred to the completion of the agency's administrative process.

2. Whether the statutory scheme for enforcement of administrative subpoenas violates the Fourth Amendment.

STATEMENT

1. In October 1973, EEOC Commissioner Ethel Bent Walsh filed a "Commissioner's charge"[1] against petitioners alleging systemic discrimination in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. (1970 ed. and Supp. V) 2000e *et seq.*.

Asserting that the charge was filed in retaliation for their critical reports to Congressmen concerning an earlier EEOC investigation,[2] petitioners filed an action in the Western District of Oklahoma seeking an injunction against any proceedings under the charge. The district court dismissed the complaint, holding that the suit was premature. On

[1]See, Section 706(b) and (d) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259, as amended, 42 U.S.C. (and Supp. V) 2000e-5(b) and (d) (Pet. App. 1a-3a).

[2]The allegation of retaliation was based largely on the fact that Commissioner Walsh filed her charges some seven months after an unnamed agent of the EEOC had purportedly threatened petitioners with a lawsuit. The Commissioner in response to interrogatories swore that she was briefed as to petitioners' employment practices only by her Special Assistant, and that she had no knowledge that any of the petitioners had written to their Congressmen.

appeal, the court of appeals ordered reinstatement of the complaint but directed that it lie dormant until completion of the EEOC's administrative proceedings. The court of appeals directed the trial court to fix a reasonable time for completion of the administrative action (Pet. App. 13a-14a).

2. After remand, petitioners refused voluntarily to provide the EEOC with information or to honor an administrative subpoena for such information. When EEOC sought judicial enforcement of the subpoena, petitioners again raised the issue of bad faith in the filing of the charge.[3] The district court ruled that subpoena enforcement was part of the administrative process and that, under the mandate of the court of appeals, petitioners' claims of bad faith were not to be heard until the administrative process was completed (Pet. App. 18a). With some minor modification, the court ordered the subpoena enforced, finding it reasonable in scope and within the authority of the Commission (Pet. App. 19a-23a). In January 1978, the Tenth Circuit affirmed the district court's order (Pet. App. 30a-31a). The court of appeals stated (Pet. App. 31a):

> The subpoena is clearly part of the administrative proceedings referred to in our previous opinion which must be allowed to go forward as therein ordered.

The petition for a writ of certiorari in part seeks review of that judgment.

[3]At this stage in the proceedings, petitioners' allegations of an EEOC vendetta were based solely on the allegations in its earlier complaint (CIV-74-295-E). However, before the district court ruled in this action, petitioners included in the record the affidavits of its attorney, Charles A. Kothe, and its production manager, Robert H. Spahn (Pet. App. 38a-44a). Except for providing the name of the EEOC agent who allegedly made the threat, the affidavits added nothing new.

3. Petitioners' applications for a stay pending appeal of the order directing subpoena enforcement were denied by the Tenth Circuit and by Mr. Justice White in March 1977.[4] Shortly thereafter, petitioners simultaneously filed a third suit in the district court (Civ. 77-0261-B) and, in the Tenth Circuit, a "Suggestion of Lack of Jurisdiction by the Court of Portion of Appeal."[5] In addition to the three EEOC Commissioners then holding office, petitioners' complaint named United States District Judge Eubanks as a defendant. The thrust of the allegations was two-fold: (1) that the Commissioners and Judge Eubanks had violated the Fourth Amendment by subpoenaing petitioner's records without permitting a prior inquiry into whether the charge which gave rise to the EEOC's investigation was based on "probable cause"; (2) that the statutory provisions of Title VII—Sections 709 and 710—under which the subpoena was issued and enforced, violate the Fourth Amendment because they do not provide for an inquiry into "probable cause" or permit challenges pertaining to the alleged EEOC vendetta against petitioners until the EEOC has completed its administrative processes.

The district court (Bohanon, J.) dismissed the complaint. The court (Pet. App. 34a-35a) found the complaint

> sham, frivolous, vexat[ious] and filed in bad faith as a dilatory tactic for the sole purpose of further delaying

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[4]On June 24, 1977, in the district court, petitioners sought a limited protective order from the district court's order of June 18, 1976, enforcing the subpoena. The district court (Eubanks, J.) denied this request on September 12, 1977, noting "* * * EEOC's contention that this motion is but part and parcel of a strategy of obfuscation is not unreasonable."

[5]The Tenth Circuit denied petitioner's suggestion of lack of jurisdiction in April, 1977.

> or impeding the administrative process of the United States Equal Employment Opportunity Commission in its investigation of a charge against Plaintiffs * * *.

The Tenth Circuit affirmed the district court, stating (Pet. App. 37a):

> The enforcement of the subpoena does not constitute an unreasonable search and seizure. We have made it unmistakably clear that the administrative action must be allowed to run its course before a broad-scale constitutional attack may be considered.

The petition for a writ of certiorari seeks review of that judgment as well as the holding that petitioners must comply with the EEOC subpoena.

ARGUMENT

1. Petitioners argue the case as if the courts below had precluded them from ever obtaining a hearing on their claim that the Commission was proceeding in bad faith. While, in our view, the courts would have been justified in ruling that petitioners had never made sufficient allegations to justify a hearing on their claims of bad faith,[6] that is not what the

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[6]Petitioners alleged that an unnamed EEOC investigator made threats that petitioners would suffer for writing a letter to a Congressman criticizing a prior EEOC investigation of a charge, and that, some seven months later, a charge was filed by a Commissioner. They presented no facts indicating even a slight connection between the investigator and Commissioner Walsh or the Commission as a body.

In *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 53 F.R.D. 330, 337-339 (N.D. Ga.), affirmed, 468 F. 2d 25 (C.A. 5), modified *en banc*, 472 F. 2d 1147, certiorari denied, 412 U.S. 939, the court refused to find a "conspiracy" between EEOC officials and a charging party, on a record that included more detailed allegations of collusion than this case. The court termed them "insufficient to elevate the issue of the Commission's good faith to a substantial question deserving of further inquiry by the Court" (53 F.R.D. at 339).

court below held. In its first opinion, the court of appeals did find that because of the mixture of allegations as to constitutional rights and procedural irregularities, the complaint "at this stage must be viewed as an attempt to divert, forestall, or anticipate administrative proceedings" (Pet. App. 13a). Its actual ruling, however, was that petitioners' claims could more efficiently be considered at the close of the administrative process than at the beginning. In directing reinstatement of the complaint, the court of appeals held that petitioners would have a right to a hearing when that process was completed.

Petitioners showed no disposition to allow the administrative process to be completed. Rather, they constantly sought to delay it, first by refusing to furnish information voluntarily and then by refusing to obey an administrative subpoena (and later by trying to delay court ordered production). Under the circumstances, as the court below held, the subpoena enforcement proceeding in the district court, the subject matter of this suit, is properly viewed as merely part of the administrative process which the court of appeals had ordered completed before petitioners' various attacks on that process, including the claim of bad faith, could be heard.

That decision, limited to the particular facts of this case, is thus not in conflict with the decisions on which petitioners rely to the effect that, in an exceptional case, on a substantial showing of abuse of process, a court in a subpoena enforcement proceeding may conduct a threshold inquiry into the reasons underlying an investigation. *United States* v. *Powell*, 379 U.S. 48, 57-58; *Donaldson* v. *United States*, 400 U.S. 517, 526-527; *United States* v. *Bisceglia*, 420 U.S. 141, 146. *Powell* and the decisions following it do not require delay of an investigation to inquire into every claim of bad faith. See *United States* v. *Newman*, 441 F. 2d 165, 169 (C.A. 5). As this Court stated in *Donaldson*, *supra*, 400

U.S. at 529, "*Powell* was not intended to impair a summary enforcement proceeding so long as the rights of the party summoned are protected and an adversary hearing, if requested, is made available."

Since petitioners can make their challenges at the end of the administrative process, and since the EEOC cannot file a suit until it finds reasonable cause and conciliation fails, petitioners have suffered no real harm by the deferral of a hearing on their allegations until completion of the administrative process.[7]

2. Petitioners' suit, challenging the constitutionality of Title VII's statutory subpoena provisions, which require court enforcement, was properly dismissed as frivolous. It was, as the courts below found, a blatant attempt to avoid the effect of the denial of a stay of the enforcement order pending review. Moreover, the complaint on its face was without merit.

To the extent that the action was predicated on the claim that it was unconstitutional to deny petitioners the right to assert bad faith as a defense to the subpoena, petitioners were attacking, not the statute, but the interpretation given to the statute by the district court and the court of appeals. That issue, as noted, was already pending in the court of appeals when the complaint was filed.

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[7]In 1978, the district court (Eubanks, J.), *sua sponte*, dismissed the suit without prejudice. Noting that "the history of this investigation is fraught with instances of delay, diversion and obfuscation," the court concluded that, "at the time the matter was before the Court of Appeals more than two and one-half years ago, it could not have been foreseen that the period of dormancy would extend with Rip Van Winkle-like projection." The dismissal is, however, without prejudice to petitioners' right to reinstate the case, if that became necessary, and is conditioned on the waiver by EEOC of any limitations defense. Discovery already accomplished may be fully utilized in any subsequent action. Thus, petitioners' right to a hearing is not impaired.

Beyond that, petitioners, in the courts below, endeavored to assert the long discredited notion that an administrative subpoena is a search and seizure which cannot be permitted without a showing of probable cause. See *United States* v. *Powell*, 397 U.S. 48, 57; *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643; *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 194-195, 208-209. In this Court, they argue that under the ruling in *Marshall* v. *Barlow's, Inc.*, No. 76-1143, decided May 23, 1978, the statute is unconstitutional in permitting enforcement of a subpoena relating to a Commissioner's charge without an affirmative showing of the facts establishing reasonable cause for the charge.

The relevance of *Barlow's*, which dealt with entry for inspection, is not apparent. Neither Section 709 nor Section 710 permits the Commission to enter, inspect, or remove private property without the owner's permission, except pursuant to a court-enforced subpoena. Moreover, *Barlow's* dealt with a situation in which there was wholly lacking the opportunity for any type of judicial review. The subpoena enforcement provisions of Title VII include judicial review procedures.

Petitioners admit that a written charge by a person aggrieved is enough showing of cause to support a subpoena, but argue that the sworn charge of an EEOC Commissioner, a responsible government official, to the effect that she had probable cause to believe that the companies were violating Title VII, does not constitute a valid basis for an investigation. They offer no authority for this novel proposition. To the extent that they are seeking indirectly to re-argue the point made below, that the charge was not specific enough to support the investigatory process, they are raising an issue consistently rejected by the courts of appeals. See *e.g.*, *New Orleans Public Service, Inc.* v. *Brown*, 507 F. 2d 160 (C.A. 5); *Equal Employment Opportunity Commission* v. *University of New Mexico, Albuquerque, New Mexico*, 504 F. 2d 1296, 1304 (C.A. 10), and cases cited therein; *Local No. 104, Sheet Metal Workers International Association* v. *Equal Employment Opportunity Commission*, 439 F. 2d 237 (C.A. 9); *Bowaters Southern Paper Corp.* v. *Equal Employment Opportunity Commission*, 428 F. 2d 799 (C.A. 6), certiorari denied, 400 U.S. 942.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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